Filed 1/9/18 P. v. Fontenot CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOHN FONTENOT, Defendant and Appellant.	B271368 (Los Angeles County Super. Ct. No. NA093411)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary Ferrari, Judge. Affirmed.

Michael Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General and Robert M. Snider, Deputy Attorney General, for Plaintiff and Respondent.

Appellant John Fontenot was charged with one count of simple kidnapping. (See Pen. Code, § 207.) At a bench trial, the court found Fontenot not guilty of kidnapping, but guilty of attempted kidnapping.

Fontenot argues the court lacked jurisdiction to convict him of attempted kidnapping because that offense was neither charged in the accusatory pleading, nor necessarily included in the alleged crime of kidnapping. Although Fontenot acknowledges the California Supreme Court has previously held that attempted kidnapping is a lesser included offense of kidnapping (see *People v. Martinez* (1999) 20 Cal.4th 225, 241 (*Martinez*)), he contends that decision is no longer valid in light of the Court's subsequent decision in *People v. Bailey* (2012) 54 Cal.4th 740 (*Bailey*). We affirm, concluding we are bound by the Court's holding in *Martinez*.

FACTUAL BACKGROUND

A. Summary of Facts Preceding Trial

On March 23, 2016, the District Attorney for the County of Los Angeles charged defendant John Fontenot with one count of kidnapping. (Pen. Code, § 207, subd. (a).)[1] The information further alleged that the victim of the kidnapping was under 14 years of age. (§ 208, subd. (b).)[2]

---

[1] Unless otherwise noted, all further statutory citations are to the Penal Code.

[2] The information also included numerous special allegations regarding prior offenses, asserting that Fontenot had suffered three prior strike convictions within the meaning of the California Three Strikes Law (§§ 667.5 and 1170.12), three prior

At a bench trial, Destiny L. testified that on the night of September 15, 2012, she was babysitting a four-year-old child named Madeline in the lobby of an apartment building. Madeline was "playing dolls" with two other girls her age. Sometime between 9:00 and 10:00 p.m., Destiny heard the lobby door open, and saw Fontenot enter the building. He was barefoot, wearing only underwear and a shirt. Destiny had previously seen Fontenot washing himself with a hose located in front of the building.

Fontenot approached the three girls, and told Madeline to "come here." He then grabbed Madeline's arm, and pulled her across the lobby, toward the exit of the building. As Fontenot was pushing open the exit door, Destiny grabbed Madeline's other arm, and told the other two girls to run. Destiny then kicked Fontenot, causing him to reach toward his leg, and release Madeline. Destiny picked up Madeline, and brought her to the family's apartment.

A police officer involved in the investigation testified that he arrived at the family's apartment approximately one hour after the incident, and saw Madeline wrapped in a blanket, crying. The officer stated that the child looked scared and "visibly shaken."

Fontenot testified in his defense. He denied entering the building, and denied touching the child. He admitted he had used drugs in the past, but asserted that he had not used drugs on the date of the incident.

At closing argument, the district attorney argued that the evidence established Fontenot had used force to move Madeline

---

prison term felonies (§ 667.5, subd. (b)) and three prior serious felonies (§ 667, subd. (a)).

without her consent, and that the only "issue" for the court to decide was whether Madeline had been moved for a "substantial distance." The district attorney asserted that Destiny's testimony showed Fontenot had pulled Madeline across a fifteen-foot wide apartment lobby, and had moved the child in a manner that increased her risk of harm.

In response, defense counsel argued that while there was sufficient evidence to support a finding that Fontenot had attempted to kidnap Madeline, the evidence was not sufficient to convict him of kidnapping: "The only issue is was this a kidnapping or attempted kidnapping. . . . [¶] . . . [¶] You have an attempt. And I'll submit it to the court. I think the evidence is sufficient to show an attempt. It is not sufficient for actual kidnapping. There is no substantial movement."

The court agreed with defense counsel, explaining that Fontenot's actions constituted a "classic attempt" because he had only moved the victim a "short distance" before Destiny intervened. After hearing further argument, the court announced its verdict: "I feel there was definitely a crime but I don't believe it was a completed kidnapping. I think it was an attempt, and, of course, it goes from an attempt, all of a sudden becomes a specific intent crime, which I find was there, and I'm going to find the defendant not guilty of the kidnapping but guilty of the attempted kidnapping."

The next day, defense counsel submitted a letter brief arguing that the court lacked jurisdiction to convict Fontenot of attempted kidnapping because: (1) the district attorney had not charged Fontenot with attempt; and (2) attempted kidnapping is a specific intent crime, and therefore does not qualify as a lesser included offense of kidnapping, a general intent crime. Although

defense counsel acknowledged the evidence "might support [an attempt] conviction," she argued the court had no authority to "make a finding as to an uncharged offense." After hearing oral argument on the issue, the trial court ruled that attempted kidnapping was necessarily included within the charged offense of kidnapping. The court also found that Fontenot's conviction qualified as a third strike offense, and that he had suffered three prior serious felony convictions and three prior prison term felonies.

The court sentenced Fontenot to an aggregate term of 40 years to life in prison, which consisted of 25 years to life in prison for the attempted kidnapping, plus three consecutive five-year terms for the three prior serious felonies.

DISCUSSION

Fontenot argues the trial court had no authority to convict him of attempted kidnapping because that offense was not charged in the accusatory pleading, and is not a lesser included offense of kidnapping. Although Fontenot acknowledges that our Supreme Court has previously found attempted kidnapping to be a lesser included offense of kidnapping (see *Martinez, supra,* 20 Cal.4th 225), he asserts the Court effectively overruled that holding in *Bailey, supra,* 54 Cal.4th 740.

A. Summary of Relevant Law

"'When a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime. [Citations.] This reasoning rests upon a constitutional basis: "Due process of law requires that an accused be advised of the charges against him in

order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." [Citation.]' [Citations.]" (*People v. Lohbauer* (1981) 29 Cal.3d 364, 368-369; see also *In re Fernando C.* (2014) 227 Cal.App.4th 499, 502-503 ["Due process of law requires that an accused be advised of the charges against him; accordingly, a court lacks jurisdiction to convict a defendant of an offense that is neither charged in the accusatory pleading nor necessarily included in the crime alleged"].)

Simple kidnapping is "a 'general intent crime'" (*People v. Bell* (2009) 179 Cal.App.4th 428, 435 (*Bell*); see also *People v. Davis* (1995) 10 Cal.4th 463, 519) that requires the prosecution to "'prove three elements: (1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance.' [Citation.] This last element, i.e., that the victim be moved a substantial distance, is called the 'asportation' element." (*Bell, supra,* 179 Cal.App.4th at p. 435.) Attempted kidnapping, in contrast, is a specific intent crime that has two elements: a specific intent to commit kidnapping, and a direct but ineffectual act done toward its commission. (See § 21a; *People v. Clark* (2011) 52 Cal.4th 856, 948 [attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward is commission]; *People v. Cole* (1985) 165 Cal.App.3d 41, 47-48 [attempted kidnapping is a specific intent crime].)

In *Martinez, supra,* 20 Cal.4th 225, the defendant was charged with simple kidnapping (§ 207, subd. (a)). The evidence at trial showed the defendant had moved the victim 40 or 50 feet

from a residence before responding officers intervened. The jury found the defendant guilty of kidnapping.

The Supreme Court granted review to clarify "the asportation requirement [for] simple kidnapping, and articulate what factors are appropriate to making that determination." (*Martinez, supra*, 20 Cal.4th at p. 229.) The Court explained that its prior decisions had held "distance [was] . . . the sole criterion for assessing asportation" in simple kidnapping cases. (*Id*. at p. 234.) After reviewing the language and history of section 207, the Court overruled those prior decisions, holding that the jury could properly consider factors other than distance, including "whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*Id*. at p. 237.) The Court also concluded, however, that this multi-factor asportation standard could not be applied retroactively to the defendant, and that there was insufficient evidence to sustain his kidnapping conviction under the previously-applicable, distance-based standard.

The Court further found that because there was insufficient evidence to sustain the defendant's kidnapping conviction, the proper remedy was to modify the judgment to attempted kidnapping: "Although we must reverse the kidnapping count, [Penal Code] section 1181, subdivision 6,[3] authorizes us to

---

3 Section 1181, subdivision 6 states: "When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a

reduce the conviction to the lesser included offense of attempted kidnapping . . . in light of the record." (*Martinez, supra*, 20 Cal.4th at p. 241.) The Court explained that the evidence at trial conclusively established that "but for the prompt response of the police, the movement would have exceeded the minimum asportation distance set by [prior cases]." (*Ibid*.)

Two years later, in *People v. Kelly* (1992) 1 Cal.4th 495 (*Kelly*), the Court imposed a similar remedy after having reversed a rape conviction. The defendant in *Kelly* was charged with rape and several other offenses. The evidence at trial raised a factual issue as to whether the victim had died before the sexual assault occurred. The trial court instructed the jury that "[i]t is legally possible to rape a dead body." (*Id*. at p. 526.) The Supreme Court found this instruction was erroneous, and that the error required a reversal of the defendant's rape conviction. The Court further concluded, however, that "the error would not . . . have affected a conviction of the lesser included offense of attempted rape," and modified the judgment of conviction to attempted rape. (*Id*. at p. 528.)

In *Bailey*, *supra*, 54 Cal.4th 740, the defendant was charged with "'escape from custody,' in violation of Penal Code section 4530, subdivision (b)." (*Id*. at p. 745.) The evidence at trial showed the defendant was found "in an area where inmates were not permitted without authorization." (*Id*. at p. 744.) During a subsequent investigation, prison officials determined the defendant had reached the location by sawing through the

---

lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed."

bars of his cell window, and breaching several security fences. The defendant was interrogated, and admitted he was trying to escape the prison facility. At trial, however, the defendant denied that he had been trying to escape, asserting he had cut through several layers of prison security to attack another inmate, against whom he held a grudge. The jury was instructed that to constitute an escape, it was not necessary for the defendant to have left the outer limit of the prison facility. Instead, the defendant need only have passed beyond a barrier intended to keep the prisoner within a designated area. The jury found defendant guilty of escape.

The appellate court reversed based on instructional error, concluding that the crime of escape requires an inmate to have moved beyond the outer boundary of the prison facility. The court further held that while there was sufficient evidence to support a finding of attempted escape, it had no authority to modify the judgment to that lesser offense because "attempt to escape contains an element of specific intent to escape that escape does not." (*Bailey*, *supra*, 54 Cal.4th at p. 747.) Thus, "attempted escape is not a lesser included offense of escape." (*Ibid*.)

The Supreme Court "granted review solely on the modification issue." (*Bailey*, *supra*, 54 Cal.4th at p. 747.) In its analysis, the Court explained that under "section[] 1181, subdivision 6, . . . an appellate court that finds that insufficient evidence supports the conviction for a greater offense may, in lieu of granting a new trial, modify the judgment of conviction to reflect a conviction for a lesser included offense." (*Id*. at p. 748.) The Court further explained that "two tests [apply] in determining whether an uncharged offense is necessarily

included within a charged offense: the 'elements' test and the 'accusatory pleading' test. [Citation.] The elements test is satisfied if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, such that all legal elements of the lesser offense are also elements of the greater. [Citation.] In other words, "'[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.'" [Citations.] Under the accusatory pleading test, a lesser offense is included within the greater charged offense if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense. [Citations.]" (*Id*. at p. 748.)

After concluding that the accusatory pleading test was inapplicable, the Court analyzed whether attempted escape was a lesser included offense of escape under the elements test. The Court explained that escape is a "general intent crime" that is "'completed when the prisoner wilfully leaves the prison camp, without authorization. . . .' [Citations.] The only requisite for its commission is that the defendant intentionally do the act which constitutes the crime.' [Citation.] Thus, for instance, evidence that a defendant was voluntarily intoxicated or intended to return when he left is generally immaterial to the commission of escape." (*Bailey*, *supra*, 54 Cal.4th at p. 749.) Attempt to escape, in contrast, "requires a specific intent to escape. . . . Thus, '[i]t is not possible to attempt to escape without intending to escape.' [Citation.]" (*Ibid*.) The Court held that because attempted escape "requires additional proof that the prisoner actually intended to escape," it does not qualify as a "lesser included offense of escape." (*Ibid*.)

In its analysis, the Court considered and rejected the Attorney General's assertion that "attempt is [always] a lesser included offense of any completed crime." (*Bailey*, *supra*, 54 Cal.4th at p. 747.) In support of this argument, the Attorney General had cited language from prior Supreme Court decisions stating that a crime cannot be "'committed in the absence of an attempt to commit it," and "point[ed] to" *Martinez* and *Kelly* as examples of cases in which the Court had previously "reduced a general intent offense to an attempt to commit that offense." (*Bailey*, *supra*, 54 Cal.4th at p. 747.) The Court, however, concluded those prior cases were not controlling, explaining: "'[T]he law of "attempt" is complex and fraught with intricacies and doctrinal divergences. [Citation.] 'As simple as it is to state the terminology for the law of attempt, it is not always clear in practice how to apply it.' [Citation.] Thus, '[w]e must not generalize in the law of attempt.' [Citation.] Although the . . . cases relied on by the Attorney General have stated or applied the general principle that attempt is a lesser included offense of any completed crime, it is not applicable here, where the attempted offense includes a particularized intent that goes beyond what is required by the completed offense." (*Id.* at p. 753.)

In *People v. Braslaw* (2015) 233 Cal.App.4th 1239, the defendant was convicted of raping an intoxicated person. On appeal, he argued the trial court was obligated to instruct the jury on attempted rape of an intoxicated person, "contending the crime is a lesser included offense of rape of an intoxicated person." (*Id.* at p. 1247.) In assessing this claim, the court explained that under *Bailey*, "[a]ttempts are only lesser included offenses if the sole distinction between the attempt and the

completed offense is completion of the act constituting the crime. [Citation.] If the attempt requires a heightened mental state, as is the case with attempts of many general intent crimes, the attempt requires proof of an additional element and is therefore not a lesser included offense." (*Id.* at p. 1248.)

The court then analyzed the elements of the crimes at issue, explaining that "[a]ctual rape of an intoxicated person is . . . . a general intent crime" (*Braslaw, supra,* 233 Cal.App.4th at p. 1250), while attempted rape of an intoxicated person requires specific intent to commit the crime. (*Id.* at p. 1249.) The court also highlighted certain consequences that result from those differing mental states. First, the court explained that "[a]s a specific intent crime, attempted rape of an intoxicated person hinges on a defendant's actual intent and, thus, is subject to a good faith, unreasonable mistake of fact defense." (*Id.* at p. 1249.) For the general intent crime of rape of an intoxicated person, however, mistake of fact is available as a defense only "if the mistake was objectively reasonable." (*Id.* at p. 1250.) Second, the court explained that while "[i]ntoxication can negate the required mental state of a specific intent crime, such as attempted rape of an intoxicated person," intoxication cannot negate the "general intent . . . mental state required for actual rape of an intoxicated person." (*Ibid.*) According to the court, given "the significantly different intent requirements" between the two offenses, "attempted rape of an intoxicated person is not a lesser included offense of rape of an intoxicated person." (*Id.* at p. 1252.)

The court also addressed the Supreme Court's prior decision in *Kelly*, which had reversed a rape conviction, and modified the judgment to "'the lesser included offense of

attempted rape.'" (*Braslaw, supra,* 233 Cal.App.4th at p. 1251 [citing and quoting *Kelly*].) The court concluded *Bailey*, rather than *Kelly* was controlling, explaining: "*Kelly* significantly predate[s] *Bailey*, and [did not] appl[y] the elements test set forth in that case. In fact, . . . *Kelly* [did not] engage[] in any analysis to establish that attempted rape is a lesser included offense of forcible rape. Furthermore, the Supreme Court, in other, more recent cases, has recognized that rape and attempted rape require different kinds of intent. [Citations.] [¶] . . . [¶] We therefore conclude *Bailey* is controlling and compels the conclusion attempted rape of an intoxicated person is not a lesser included offense of rape of an intoxicated person." (*Braslaw, supra,* 233 Cal.App.4th at p. 1252.)[4]

B. We Are Compelled to Follow Martinez

Although Fontenot acknowledges *Martinez* "treated attempted kidnapping as a lesser included offense of kidnapping", he argues that *Bailey* effectively overruled that portion of *Martinez*, clarifying that when an attempted crime contains a specific intent element that is not required to complete the offense, the attempt is not a lesser included offense of the completed crime. Fontenot further asserts that applying *Bailey's* framework here, attempted kidnapping, a specific intent crime, is not a lesser included offense of kidnapping, a general intent crime.

---

[4] See also *People v. Hamernick* (2016) 1 Cal.App.5th 412 [applying *Bailey* and concluding that attempted possession of a controlled substance is not a lesser included offense of possession.]

We agree that the analysis in *Bailey* suggests that if an attempt requires a heightened mental state that is not required to prove the completed crime, it does not qualify as a lesser included offense. (See *Braslaw, supra,* 233 Cal.App.4th at p. 1248; *People v. Ngo* (2014) 225 Cal.App.4th 126, 156 [under *Bailey*, "'when the completed offense is a general intent crime, an attempt to commit that offense does not meet the definition of a lesser included offense under the elements test because the attempted offense includes a specific intent element not included in the complete offense'"]; *People v. Mendoza* (2015) 240 Cal.App.4th 72, 83 (*Mendoza*).) Moreover, as Fontenot correctly notes, our courts have previously held that kidnapping is a general intent offense (*Davis, supra,* 10 Cal.4th at p. 519; *Bell, supra,* 179 Cal.App.4th at p. 435), and that attempted kidnapping is a specific intent offense. (*Cole, supra,* 165 Cal.App.3d 41, 47-48 [attempted kidnapping requires specific intent].) Thus, as discussed in *Braslaw*, certain defenses that negate specific intent, including voluntary intoxication and unreasonable mistake of fact, would presumably be available as defenses against attempted kidnapping, but not available against a charge of kidnapping. (See *People v. Atkins* (2001) 25 Cal.4th 76, 81-82 [evidence of intoxication is generally "inadmissible to negate the existence of general criminal intent," but admissible "to negate the existence a specific intent"]; *People v. Givan* (2015) 233 Cal.App.4th 335, 350 ["for a general intent crime any mistake of fact must be both reasonable and actual before it is presented to the jury. [Citation.] In contrast, an unreasonable mistake of fact may be asserted in a specific intent crime . . . so long as the defendant had an actual mistaken belief"]; see also *Mendoza*, *supra*, 240 Cal.App.4th. at p. 83.)

The Court's rationale in *Bailey* appears to undermine its conclusion in *Martinez* that attempted kidnapping is a lesser included offense of kidnapping. However as an intermediate appellate court, we "must accept the law declared by courts of superior jurisdiction. It is not [our] function to attempt to overrule decisions of a higher court." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity*).)

Martinez is a directly controlling case, and expressly states that attempted kidnapping is a lesser included offense of kidnapping. That language cannot be deemed dicta because the Court did in fact reduce the defendant's conviction to attempted kidnapping, an offense that was neither charged in the information nor pursued by the prosecution at trial. Moreover, *Bailey* specifically cites *Martinez* as an example of a case in which the Court had previously found it proper to "reduce a general intent offense to an attempt to commit that offense." (*Bailey*, *supra*, 54 Cal.4th at p. 753.) *Bailey* does not contain any language directly questioning *Martinez's* continued validity in kidnapping cases. Instead, *Bailey* explained that "'[t]he law of "attempt" is . . . fraught with intricacies and doctrinal divergences.'" (*Ibid.*)

Given that *Bailey* treated the *Martinez* analysis as inapplicable to the situation before it, and the complexities inherent in the law of attempt (see *Bailey*, *supra*, 54 Cal.4th at p. 753 ["'[t]he law of "attempt" is complex and . . .' . . . . not always clear . . . how to apply"], we decline to disregard *Martinez's* express finding that attempted kidnapping qualifies as a "lesser included offense" of kidnapping. (*Martinez*, *supra*, 20 Cal.4th at p. 241.) We recognize that other courts have, as discussed above, applied the *Bailey* analysis to crimes other than kidnapping,

where there was no other binding Supreme Court precedent. Here, however, there is direct authority.[5] Unless and until the Court reverses *Martinez*, we are bound by that holding. (See *Auto Equity*, *supra*, 57 Cal.2d at p. 455 ["Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. . . . The decisions of [the California Supreme Court] are binding upon and must be followed by all the state courts of California. . . .].)

DISPOSITION

The judgment is affirmed.

ZELON, Acting P. J.

We concur:

SEGAL, J. BENSINGER, J.*

---

[5] In light of the apparent confusion in the intermediate appellate courts following *Bailey*, we respectfully suggest the Supreme Court provide further guidance with regard to the issues surrounding attempted kidnapping.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.